

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OCT 31 2019

Re: FOIA No. FY19-80
Final Response

VIA E-MAIL AND REGULAR MAIL

Emma Best
MuckRock News
DEPT MR 73728
411A Highland Ave.
Somerville, MA 02144-2516
73728-41167949@requests.muckrock.com

Dear Ms. Best:

This is a response to your correspondence of May 29, 2019, in which you requested information pursuant to the Freedom of Information Act (FOIA),¹ and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108 (2019). Specifically, you requested all documents in the agency's possession that pertain to the WikiLeaks website or organization from January 2006 to the date of this request including, but not limited to, emails, memos, notes, briefings, reports and other documents related to, mentioning or generated as a result of:

- (1) Guidance and instructions for employees regarding visiting the website otherwise reading or learning about it in the news;
- (2) Internal reactions to the website's existence and disclosures;
- (3) Damage reports regarding the website and its disclosures;
- (4) Efforts to identify, investigate and/or mitigate potential leaks to the website; and
- (5) Efforts to identify, investigate and/or mitigate potential unauthorized viewing of the website or news reports analyzing it and/or its contents.²

On July 15, 2019, the Director of the Office of External Affairs issued a determination regarding 31 responsive documents, releasing 19 in their entirety and 12

¹ 5 U.S.C. § 552, *as amended by* the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016).

² Per correspondence with the Commission, on May 27, 2019, you agreed to narrow the scope of this request to be limited to the Office of the Executive Director.

with redactions pursuant to FOIA Exemption 6.³ On July 17, 2019 you agreed to narrow your request to exclude subscription emails, and based on the new search terms, Commission staff identified 20 additional documents. Of the 20 additional documents 16 documents will be withheld in their entirety based on FOIA Exemption 5.⁴ The remaining four documents are released with redactions to the names and contact information of lower-level Commission personnel pursuant to FOIA Exemption 6.

FOIA Exemption 5 protects from disclosure “inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency.” More specifically, FOIA Exemption 5 incorporates various privileges, including the deliberative process privilege, which is at issue here. Courts have consistently held that three policy purposes constitute the basis for the FOIA Exemption 5 deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. *See Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that “[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny”).

Here, the 16 withheld e-mails are either internal deliberations between FERC staff (inter-agency) or discussions between FERC and other qualifying federal agencies (intra-agency). Not only would release of the documents risk chilling future staff discussion on such matters, it could cause public confusion by disclosing analyses that ultimately did not form part of the final agency analysis released to the public. As such, 16 documents are being withheld in their entirety.

The four remaining documents are enclosed. As provided by the FOIA and 18 C.F.R. §388.110(a)(1) of the Commission’s regulations, any appeal from this determination must be filed within 90 days of the date of this letter. The appeal must be in writing, addressed to James P. Danly, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, and clearly marked “Freedom of Information Act Appeal.” Please include a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

³ 5 U.S.C. § 552(b)(6) (protecting from disclosure files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy).

⁴ 5 U.S.C. § 552(b)(5) (protecting inter-agency or intra-agency memoranda).

You have the right to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue your appeal. You may contact OGIS by email at ogis@nara.gov; telephone at (877) 684-6448; facsimile at (301) 837-0348; or by mail to the Office of Government Information Services, National Archives and Records Administration, Room 2510, Adelphi Road, College Park, MD 20740-6001.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Tao", with a large circular flourish at the end. Below the signature, the word "for" is written in a simple, lowercase font.

Leonard M. Tao
Director
Office of External Affairs

Enclosures (4)